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No. 99-345

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

COUNTY OF COOK, ILLINOIS, EDWARD J. ROSEWELL, COUNTY TREASURER AND COUNTY COLLECTOR OF THE COUNTY OF COOK, ILLINOIS, DAVID D. ORR, CLERK OF THE COUNTY OF COOK, ILLINOIS, THOMAS C. HYNES, ASSESSOR OF COOK COUNTY, AND THE PEOPLE OF THE STATE OF ILLINOIS, ON RELATION OF EDWARD J. ROSEWELL AND THE COUNTY OF COOK

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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1. a. In *United States* v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506, 514-515 (1940), this Court unanimously held that, when there is "a collision between the desirable principle that rights may be adequately vindicated through a single trial of an issue and the sovereign right of immunity from suit * * * the doctrine of immunity should prevail." For the reasons discussed in detail in the petition (Pet. 15-20), the contention of respondents (Br. in Opp. 13-26) that *USF&G* applies only when the first proceeding

occurred in a court that lacked subject matter jurisdiction cannot be reconciled with the decisions of this Court or the courts of appeals. As other courts have consistently held, the decision in *USF&G* establishes that the doctrine of *res judicata* "is inapplicable where the issue is the waiver of [sovereign] immunity." *Corbett* v. *MacDonald Moving Services, Inc.*, 124 F.3d 82, 88 n.3 (2d Cir. 1997).[1] As these courts have uniformly concluded, the holding of *USF&G* is based on the fact that "[o]fficers of the United States possess no power through their actions to waive an immunity of the United States." *United States* v. *Murdock Machine & Engineering Co.*, 81 F.3d 922, 931 (10th Cir. 1996), quoting *United States* v. *New York Rayon Importing Co.*, 329 U.S. 654, 660 (1947). Accord, *In re Bulldog Trucking, Inc.*, 147 F.3d 347, 353 (4th Cir. 1998); *CFTC* v. *Frankwell Bullion Ltd.*, 99 F.3d 299, 306 n.5 (9th Cir. 1996). See also *United States* v. *Eastport S.S. Corp.*, 255 F.2d 795, 803 (2d Cir. 1958); *Moody* v. *Wickard*, 136 F.2d 801, 803 (D.C. Cir.), cert. denied, 320 U.S. 775 (1943).

Respondents fail to cite, and thereby simply ignore, this substantial body of precedent in stating that "no court * * * has ever interpreted *USF&G* as the United States argues * * * in this case" (Br. in Opp. 25). Contrary to respondents' assertion, *USF&G* has routinely been cited by courts and commentators for the established proposition that the interests underlying the doctrine of sovereign immunity "are suffi-

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[1] The doctrine of res judicata applies "to jurisdictional determinations" as well as to other matters for which sovereign immunity may establish a defense. See, *e.g.*, *Insurance Corp.* v. *Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 n.9 (1982); *Corbett* v. *MacDonald Moving Services, Inc.*, 124 F.3d at 88-89.

ciently important to prevail over the application of the doctrine of *res judicata*". *Republic Supply Co.* v. *Shoaf*, 815 F.2d 1046, 1054 n.9 (5th Cir. 1987); accord, *Moore's Federal Practice* § 131.21[3][b], at 131-46 (3d ed. 1996). As Judge Rovner explained in her dissent in this case, the decision in *USF&G* did not rely on subject matter jurisdiction but instead "rested solely on the ground of sovereign immunity and the doctrine that sovereign immunity cannot be waived." Pet. App. 24a n.2, quoting 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4429, at 289 (1988).

b. Respondents err in asserting (Br. in Opp. 17) that this Court's decision in *Jackson* v. *Irving Trust Co.*, 311 U.S. 494 (1941), indicates that *USF&G* is based on jurisdictional, rather than sovereign immunity, grounds. In *Jackson*, the Court held that a "jurisdictional" issue that turned on factual determinations could not be raised by the United States when that issue had previously been raised and litigated by the United States in a prior proceeding between the same parties and "the issues thus raised were the same." *Id.* at 503. As we note in the petition in this case, the conclusion in *USF&G* that the doctrine of sovereign immunity "should prevail" in "a collision" with the doctrine of res judicata (309 U.S. at 514-515) "does not mean that the government may twice litigate the same defense to the same claim against the same parties." Pet. 17. It is when, as here, the sovereign immunity defense was *not* raised in the first case that it may be raised in a second action involving the same parties. *USF&G*, 309 U.S. at 515.

Respondents miss the mark in accusing the United States of engaging in "deliberate piecemeal litigation"

in this case (Br. in Opp. 26).[2] As we explain in the petition (Pet. 7, 21), the current proceedings in this case result from the fact that, in *United States* v. *Hynes*, 20 F.3d 1437 (1994), the Seventh Circuit overruled the prior decision of that court in *United States* v. *County of Cook*, 725 F.2d 1128 (1984). There is obviously nothing "deliberate" about the failure of the United States to anticipate that the court of appeals would decline to give conclusive effect to the prior judgment of that court in *County of Cook*.

c. In its effort to make the decision in *USF&G* "vanish[] from the law of judgments" (Pet. App. 19a), the court of appeals fundamentally misinterpreted the Court's holding in that case and improperly usurped the "prerogative" of this Court to determine the continuing validity of its decisions. See *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989). Although this Court held in *USF&G* that "the doctrine of [sovereign] immunity should prevail" in a conflict with the "desirable principle" of *res judicata* (309 U.S. at 514-515), the court of appeals reached precisely the opposite conclusion in the present case. Because the decision of the court of appeals is flatly inconsistent with *USF&G*, and with the numerous appellate cases applying that decision, review by this Court is warranted.

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[2] In the factual portion of their brief (Br. in Opp. 6-7), respondents inconsistently (and erroneously) imply that the liability of the United States for the penalties and interest involved here was presented and determined at an earlier stage of this case. The court of appeals correctly observed, however, that the liability of the United States for such charges "was not" addressed in the earlier proceedings (Pet. App. 3a). The history of the proceedings that led to the present action is fully set forth at pages 2-8 of the petition.

2. Respondents acknowledge (Br. in Opp. 27-28) that there is a conflict among the circuits on the second question presented in the petition in this case. They thus agree that the courts of appeals have reached conflicting conclusions on the recurring question whether a statutory waiver of sovereign immunity from "taxes" also waives the government's immunity from penalties and interest. Respondents assert, however, that it is unnecessary to resolve that conflict in this case because *res judicata* will prevent the Court from "reaching the merits" of that issue (Br. in Opp. 28).

We, of course, do not contend that the merits of this case should be reached if the Court determines that the government's claim is barred by *res judicata*. Instead, as we explain in the petition (Pet. 23), if the Court grants certiorari and determines that *res judicata* does *not* bar the government's claim on the merits in this case, the Court should *then* reach the second question presented in order to resolve the acknowledged conflict among the circuits on that issue. A remand of the pending question on the merits to the court of appeals would simply enlarge the existing conflict on that issue by enmeshing another circuit in the dispute.

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For the reasons stated here and in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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